to prepare statistical estimates of cross-elasticities of demand, the NERA study shows that there is available qualitative information to suggest that television broadcast stations compete directly against newspapers, cable, direct mail marketing, radio, outdoor (billboards), and magazines.[19] Furthermore, unlike their competitors in newspaper, direct mail, and outdoor advertising, broadcast stations have only a finite number of advertisements or products to sell.

> "The television industry, broadcast as well as cable, competes for advertising with other media, notably radio broadcasting, newspapers, and magazines.... [M]ost advertisers can substitute one medium for another in response to changes in prices of advertising time or space. Competition between television stations or networks and other media for advertising dollars may be nearly as fierce as competition among television outlets."

See NERA study, Exhibit 1 hereto, at 12. One study that has explicitly attempted to quantify elasticities of substitution among different advertising media has concluded that broadcast advertising and direct mail are fairly close substitutes, as are print advertising and direct mail; whereas, broadcast and print advertising, although substitutes for one another, have a somewhat smaller estimated elasticity of substitution. Id. at 13. NERA also notes that advertisers' expenditures with newspapers have declined over time, while those on television, particularly cable television, have increased, id.,[20] reenforcing the proposition that the various media are substitutes for

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[20]See also McClellan, "Reports of TVB's death exaggerated," Broadcasting & Cable 71 (Apr. 3, 1995), in which it is reported that the television industry "is poised, for the first time, to surpass the newspaper industry in total advertising dollars" and that television is making inroads on retail advertising, where television traditionally has lagged. In fact, Broadcasting & Cable recently reported that in 1994, total television

one another.

Without specific figures to reflect stations' market shares based on their local advertising revenues, which would require an analysis, in each market, of the local market shares for each broadcast television station, local cable system, radio station, newspaper, and each other competing media service in the market, NERA has nevertheless examined hypothetical mergers in a "worst case" analysis, making two assumptions that NERA recognizes are both wrong and unduly restrictive: (1) NERA ignored competition between television and other advertising media; and (2) NERA assumed that audience shares could be used as a reasonable proxy for relative shares in advertising revenues. The "market shares" that NERA then presents overstate the true market shares of the participants, since they omit competitive media. Even under this worst case analysis, many combinations that would not be possible under the Commission's proposal would be likely to pass muster under an antitrust test. Ex. 1 at 18. It is clear from the NERA study that many dual-station combinations in the examined markets would not impair competition. As NERA concludes, "If the FCC truly wants to promote competition among television stations then only an antitrust approach to evaluating proposed mergers can accomplish this end." Id. at 19.

B. Effects on the Market for Delivered Video Programming.

With respect to the market for delivered video programming, the Commission

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advertising, including cable TV, surpassed total newspaper advertising for the first time and that indications are that television will continue to widen the gap in the years ahead. See "Television advertising tops newspapers," Broadcasting & Cable 62 (Apr. 17, 1995).

has concluded that broadcasters effectively compete with each other, with public broadcast television stations, with cable system operators, with wireless cable operators, and possibly with DBS operators serving their "local" market. Id., at 47, ¶ 106. LSOC agrees that all of the above services compete with local television broadcasters, as discussed in section II, supra, but disagrees with the decision to exclude videocassette recorders ("VCRs"). Id. at15, ¶ 30. The Commission notes that VCR penetration has continued to grow,[21] but the Commission has concluded that VCRs "do not provide a complete schedule of video programming and so are treated as sufficiently different as to suggest that perhaps they should not be included at this time." Id.

LSOC disagrees. VCRs are utilized to provide alternatives or substitutes to what the viewer could otherwise watch on broadcast or cable television. The viewer can rent programming from a videocassette rental store, thereby inexpensively obtaining programming that he/she might otherwise have had to obtain through broadcast, cable, or some other pay service. The VCR also enables the viewer to expand his/her viewing options by permitting the user to tape one program while viewing another. VCRs are not just used to record a program for viewing at a more convenient time. See Id. n. 54. If that were the case, there would be no Blockbuster Video and similar stores. Moreover, in its 1994 Video Competition Report ,9 FCC Rcd at 7510, the Commission noted that it previously found that nationwide revenues from

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[21]The 1994 Video Competition Report, 9 FCC Rcd at 7510, noted that Time Warner's comments reported that VCRs were in nearly 84% of all U.S. television households.

the sale and rental of videocassette tapes exceeded the revenues for basic cable service and concluded that VCRs, combined with broadcasting or other over-the-air video delivery systems, offer an alternative that may act as a partial substitute for cable services. Thus it would seem that the Commission's own conclusions support inclusion of VCRs in the market.

Also with respect to the market for delivered video programming, the Commission has requested information concerning the economies that may be achieved by the common ownership of more than one station in a market. LSOC discusses these economies and how such cost savings have resulted in better programming to the public.

C. Effects on the Market for Video Program Production

The Commission's FNPRM raises the concern that the local program production market could be affected if Commission relaxation of the local ownership rules permitted one or a few broadcast station owners to exercise significant market power in the purchase of video programming. As an initial matter, the Commission does not have the jurisdiction, responsibility, or authority to be concerned about the local market for program production. LSOC does not believe, given the number of outlets available, that permitting television licensees to own two stations in their market would give a licensee in any given market sufficient market power to affect significantly the local program production market, or any of the various factors of production, i.e., labor, equipment, video programming, or other inputs to video programming. It is not even clear that there is a "local" market for program production. Local stations compete with national broadcast groups and cable services for syndicated programming. Having one or two stations in one local market will not give the local station owner sufficient market power to outbid a larger group owner (or an alternative multichannel video service provider) who has more markets to offer the programmer, whose own objective is to have its programming distributed as widely as possible. Amending the local ownership rule for television therefore would have little if any impact on the local video program production market.

V. PERMITTING OWNERSHIP OF TWO TV STATIONS IN THE SAME MARKET WILL PROMOTE DIVERSITY

The FCC's local ownership rule is similarly no longer necessary to ensure diversity in programming services. As is obvious from the discussion in section III, supra, changes in technology, including video signal compression and the development of new services unimagined in 1964, have already resulted in increased diversity in programming. Moreover, there is no necessary relationship between ownership and diversity. It is not necessarily accurate to conclude that the more separately owned stations there are, the greater diversity there will be. Increased group ownership also encourages diversity. In fact two stations, managed in common, under most circumstances, have a greater incentive to program for different niche audiences with distinct programming rather than targeting the same viewers as other separately-owned stations in a market. See Notice of Proposed Rule Making in MM Docket No. 91-140, 6 FCC Rcd 3275, 3276 (1991).

As demonstrated above, changes in the local ownership rule are necessary to afford television broadcasters some competitive relief vis-a-vis cable and other existing and expanding media. Group ownership also serves the public interest in this regard. Indeed, as the Commission has already found:

> "group ownership may lead to economies of scale, particularly given group owners' ability to consolidate management, bookkeeping, secretarial, sales and programming personnel for a number of stations, and to engage in group advertising sales and group program development and purchases."

Id.[22] The Commission has also recognized that group ownership (1) may foster expanded news gathering, editorializing and public affairs programming, (2) may lead to the development of independent programming networks, and (3) that the resulting economies of scale could lead to increased resources being available to improve the responsiveness, diversity, and quality of programming. Id. In response to the Commission's request for information about the economies to be achieved from operating two stations in the same market and how such economies result in increased program diversity, LSOC offers here just a few examples of how diversity objectives were served by common operations.

One vivid example of the way in which common operation of three radio stations in a market has increased diversity in radio programming is provided in the Washington metropolitan area by Capital Kids' Radio Co. (CKRC), the licensee of three AM radio stations in the Washington/Baltimore metropolitan area. The three stations, WKDL, Silver Spring, Maryland, WKDB, Towson, Maryland, and WKDV, Manassas, Virginia,

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[22] The OPP Paper agreed that revision of the ownership restrictions could permit economies of scale and reduced costs or improved service. OPP Paper, 6 FCC Rcd at 4103.

operate with common facilities and resources. Those economies allow CKRC to offer a unique radio program service that it could not otherwise afford to provide -- children's radio, offered 24 hours a day and targeted to audiences under 12 years of age. Since children under 12 are not reflected in Arbitron data, the sale of advertising time on the stations is very difficult. By owning three AM stations that span the market, CKRC could attempt to compete with other stations in the market and still offer a valuable but "commercially challenging" program service.

Broadcasters who have been able to combine radio and television staffs and facilities have also experienced economies of operation that have ensured the survival of broadcast stations and enabled the stations to provide news and other programming that would not otherwise be available. In Mansfield, Ohio, for example, the licensee of a UHF television station acquired that station after seeking a waiver of Section 73.3555(b) of the Commission's Rules. The UHF station was a "failed" station, having been off the air for three years. The Commission's records reflected that the previous licensee was burdened with a large upfront investment exceeding five million dollars, inability to secure cable carriage in a heavily penetrated market, and fierce competition by larger city stations (from Cleveland and Columbus) whose signals were imported by cable. The previous licensee had vigorously sought buyers, mergers, and new funding; but every initiative failed because of the cable carriage problem and the proximity of Mansfield to the Cleveland and Columbus markets. In the last extension of authority to remain dark, issued March 2, 1992, the Commission's staff noted that "the nonoperational status of the station for such a prolonged period does not serve the public interest."

The staff granted the requested waiver so that the license for the Mansfield UHF television station could be assigned to an entity whose owners already had ownership interests in the licensees of an AM, an FM, and a low power TV broadcast station. Today the UHF and the AM station survive only because of the combined operations of the stations. The licensees of these affiliated stations are able to operate from one building, using one traffic department, one accounting department, one engineering department, and one news department. These economies of operation have been the key to the financial survival of both the AM and the UHF TV station.

It should be noted that the UHF station is included in the Cleveland, Ohio, DMA, although Mansfield is 70 miles southwest of Cleveland. Mansfield is also four miles north of the Columbus DMA. Both Cleveland and Columbus stations are carried on Mansfield area cable systems, which cross the DMA boundaries, and the Mansfield UHF station must therefore compete with Cleveland and Columbus TV stations.

Mansfield's UHF station is a news and informational station, with 24 hour news, weather, sports, and public affairs programming. The station **locally produces five to six hours of its news programming each day**, Monday through Friday (less on weekends). This programming is not available on any other station and would not be broadcast in the market were it not for the ability of the UHF licensee to share staff and facilities with its affiliated radio stations. The combined news operation also produces news programming for the FM station (which has a music format) and all of the programming for the AM station, which is an all news and sports station.

Similarly, rather than speculating about what will happen to diversity when two television stations combine operations, the Commission should consider the actual examples (discussed in section VI herein) of how television LMAs (which have resulted in common operations but not common ownership) have resulted in television stations being able to go on air, stay on air, offer local news and public affairs programming, and contribute to program diversity in their markets.

The Commission has raised additional issues that should be addressed: if it relaxes its local ownership rule because other media, including cable and newspapers, will provide sufficient diversity, how should it take into account the fact that some viewers are unable to subscribe or to acquire special equipment; to what extent do fee-based sources and outlets for video programming provide true alternatives to over-the-air television for purposes of ensuring diversity. The Commission should not be overly concerned with these issues. Every medium has a cost. To view television, one must have a television set. (For many consumers, to view television one must also have cable in order to get good reception of television channels.) For the person who cannot afford cable, the video cassette rental stores offer entertainment and nonentertainment programs at a per program cost that makes them affordable. Of course, that person would need to purchase a VCR. To view anything there is a cost involved. As additional services become available offering essentially the same programming, prices may drop even further to a point where they will be more affordable to people who choose at this time not to spend their money on cable or another multichannel video service.

In any event, it appears that consumers who the Commission might believe would not be able to afford cable are in fact subscribing to cable. As Capital Cities/ABC Inc. ("ABC") pointed out in the comments it filed on March 7, 1995, in MM Docket 94-123, the Prime Time Access Rule proceeding, while cable subscription ratios do increase with annual income, almost half (46%) of the households with annual income below $10,000 nevertheless subscribe to cable. ABC Comments in MM 94-123 at 19. Obviously those low-income consumers do not believe that the cable rates are prohibitive. The consumer who wants cable will subscribe, if cable is available.[23] Furthermore, the Commission cannot assume that the difference between the numbers of homes that subscribe to cable and the number of homes that are passed by cable represents people who cannot afford cable. It is clear that there are consumers who simply choose not to subscribe. The Commission's only concern should be whether or not the consumer has choices.

VI. <u>THE COMMISSION SHOULD PERMIT TIME BROKERAGE AGREEMENTS</u>

In the <u>NPRM</u>, the Commission noted that time brokerage or local marketing agreements (collectively "LMAs") "enable separately owned stations to function cooperatively via joint advertising, shared technical facilities, and joint programming arrangements." <u>FNPRM</u> at 58-59, ¶ 133. According to the Commission's <u>FNPRM</u>, the comments it received about LMAs in response to its <u>NPRM</u> essentially expressed "two

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[23] If cable is not available, DBS certainly is. With the entry of Sony as a manufacturer, it is anticipated that DSS™ receiver costs will soon drop. <u>See</u> <u>1994 Video Competition Report</u>, 9 FCC Rcd at 7475 & n. 158, and Comments filed by DirecTV and USSB in Docket CS 94-48 cited therein (commenters believe costs of equipment will drop to half the current costs).

divergent general views": (1) TV LMAs should be basically unregulated absent evidence of abuse, irrespective of whether new television ownership rules are adopted, and (2) if the Commission does adopt rules governing TV LMAs, such rules should be no more restrictive than those governing radio. Id. LSOC does not believe these views are divergent. Obviously commenters agreed that LMAs were in the public interest and should be preserved. LSOC agrees with both positions. LMAs should be basically unregulated absent evidence of abuse, irrespective of whether new television ownership rules are adopted; but, if the Commission does adopt rules regulating LMAs between television stations, those rules should be no more restrictive than the rules governing radio LMAs.

LSOC also urges the Commission not to attribute LMAs as ownership interests unless the Commission amends the local ownership rule to permit ownership of two television stations in every market. If the Commission does not amend the local ownership rule to permit ownership of two television stations in a market, or if the Commission amends it only to change the prohibited overlap to a Grade A contour, attributing ownership to parties in LMA agreements will essentially kill LMAs; and the public interest benefits the Commission has acknowledged exist from LMAs will no longer be available to most local television broadcasters. If the Commission believes that there are public interest benefits to LMAS, it cannot adopt regulations that will make it impossible for such agreements to exist. Moreover, since the licensee of a "brokered" station must at all times maintain control, including editorial control, over its station, there is no justification for automatically attributing the "brokered" station to both parties to the agreement.

Given the explicit approval of LMAs in the radio ownership proceeding, and the worsening economic conditions facing television, documented by the Commission's OPP Paper and by licensees filing comments in this proceeding in 1992, many television broadcasters have entered into LMAs seeking the kinds of efficiencies in operations that have proven so successful in radio LMAs and "duopolies". LSOC's experience has been that television LMAs are definitely in the public interest. As demonstrated infra, they have enabled permittees with unbuilt construction permits to place their stations into operation; they have rescued stations from financial crises, resulting in more program choices for viewers; and they have resulted in an increase in news and public service programming.

Examples of new stations being able to begin broadcasting after entering into LMAs abound in television, as they do in radio. For example, after receiving a construction permit in 1990 to build a new television station, the permittee of WFTE (Channel 58), Salem, Indiana, struggled to obtain a bank loan. For three years, the station remained unconstructed and the permittee found no bank that believed the start up station would be sufficiently profitable to risk financing. After the permittee entered into an LMA with WDRB(TV), a nearby Louisville, Kentucky, television station, which provided a financing guarantee, the permittee of the Indiana station received financing, was constructed, and commenced operations within a short period of time thereafter.

Both stations are UHF television stations. One is a Fox affiliate, and the other is a Paramount affiliate. The Indiana station competes with and differentiates itself from the seven other television stations in its market by broadcasting independent and syndicated programming, as well as live university basketball and football games not carried by the networks or cable channels. Through this joint venture the viewers in the market receive more diverse programming choices.

Another example is provided by two UHF stations in the Austin, Texas, market. There, a former news anchor, who is Hispanic, had an interest in bringing Spanish language public service programming to the market. The permittee of KNVA saved its permit from expiration with resources obtained through an LMA with the licensee of another existing UHF station. KXAN-TV is an NBC affiliate. KNVA is a Warner Brothers (WB) affiliate. With only four other commercial full-power stations in Austin, there was no full power commercial station available to carry the fledgling WB network programming or many other syndicated programs. Thus, the new station, which would not have been on the air were it not for the LMA, brings more program choices to Austin consumers and more competition to the market. As a result of the LMA, the station has been able to bring Spanish language programs to the community, and a Spanish language public affairs program is in development. The station is producing a children's program hosted by a 12 year old child who interviews other children on topics of concern to children. The station has also been able to offer news at times different from the NBC affiliate, and it broadcasts its own weather. Obviously consumers have been well served by the Austin LMA.

Financially troubled stations have been able to turn their finances around and be able to invest in programming after entering into LMAs. In Battle Creek, Michigan, WOTV, a UHF ABC affiliate was squeezed by competition from an overlapping ABC affiliate, the entrance of new stations into the market, and increased programming costs. Even after eliminating its local news programming and laying off 21 news staff, the station continued to lose over one million dollars per year. Had it not entered into an LMA, the station would have gone dark. In 1991, WOTV entered into an LMA, with a VHF NBC affiliate, WOOD-TV, in Grand Rapids, Michigan. WOTV is once again producing local news programming and is now, after a four year effort, profitable. As a healthy station once again, WOTV has become an active force in community affairs, sponsoring many local civic activities and events.

Similarly, KXTX-TV, a UHF independent station in Dallas, Texas, was a marginal business -- a struggling independent television station competing with 15 stations, including major independent owners Paramount and Fox. The station had no news programs, very few viewers, big debts, and no viable future. After entering into an LMA with KXAS-TV, a VHF NBC affiliate in Fort Worth, the licensee of KXTX-TV was able to pay all of its bills and regain its financial footing. The station airs the same newscasts as KXAS-TV but at hours when no newscasts are being broadcast on any other station in the market - 7:00 p.m. and midnight. The station's LMA enabled it to provide seven hours of local election coverage. On election night it provided the first wall-to-wall local election coverage in the history of the market.

Yet another instance in which a financially troubled station was rescued by an LMA is the example of WWHO, a UHF station, now a WB affiliate, in Chillicothe, Ohio, which was poorly operated and in financial distress until it entered into an LMA with

WCMH, a VHF NBC affiliate in Columbus. After entering into the LMA, WWHO added locally-produced daily newscasts (the first 10:00 p.m. newscasts in the area), totaling 3.5 hours a week. The station also opened a news bureau and is developing weekly community affairs programs, in addition to its PSAs produced in-house and aired regularly. Sporting events of local interest have also been added to the station's schedule since the LMA, as have locally-produced children's program segments that air within children's programs. This LMA also resulted in the creation of local jobs - in traffic, news, technical operation, promotion, and sales.

The experience of this last LMA is not unique. Many LMAs result in an increase in news and public service programming. In the Fort Myers market, for example, a UHF station, WEVU in Naples, did not have a viable news department and could not afford the capital expenditures necessary to establish one. After entering into an LMA with WBBH-TV, a UHF NBC affiliate in Fort Myers, however, equipment could be shared between the two stations. The total news staff increased (combined) from 24 to 70 persons and the station added two news bureaus. WEVU, an ABC affiliate, provides its market's first 4:00 to 5:00 p.m. local newscast and plans to add the first 7:00 to 7:30 p.m. local newscasts. The two stations together provide the only local news for all the cable companies in the market. Because it had access to the satellite trucks of WBBH-TV, WEVU was able to provide extensive election coverage recently, including broadcasts from election headquarters and candidates' homes. Through the LMA, WEVU has gained access to equipment it could not otherwise afford, which has enhanced its news and public affairs programming.

Finally, in the Cleveland, Ohio market, two UHF stations were facing difficulties: one, WOIO, Shaker Heights, lost its Fox affiliation in favor of a VHF station; and the other, WUAB, Lorain, Ohio, was facing declining audience shares. By entering into an LMA, both stations have increased the quantity and quality of their local programming. Both stations have increased their public service to local residents and have substantially increased their hours of locally produced programming. WOIO has also gained a CBS affiliation.

These real life examples demonstrate more vividly than theoretical analyses the benefits to be reaped by permitting duopolies (and by continuing to allow LMAs). In every case diversity has been enhanced by the common operation and shared resources of of stations.

The Commission has already acknowledged the public service benefits of LMAs. In its Report and Order in Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992) (Radio Report), the Commission reviewed the comments and replies filed in that proceeding on the merits of LMAs and other joint ventures and concluded that:

> "The comments in this proceeding persuade us that the various operational joint venture arrangements described in the Notice generally strengthen the radio service that the public receives by providing stations that are not commonly owned with economies similar to those available to commonly owned stations. Such arrangements are generally beneficial to the industry and listening audience because they enable stations to pool resources and reduce operating expenses without necessarily threatening competition or diversity."

7 FCCRcd at 2787. Those same conclusions are true for LMAs between television broadcast stations.

In general, the Commission's observations and conclusions about LMAs and other joint ventures in the Radio Report are correct and valid for television LMAs as well. For example, in declining to limit radio joint ventures to a finite number of stations in large and diverse markets, the Commission stated that such a requirement "would deny the benefits of joint ventures to small markets, where they may be most needed." Id.

Another observation the Commission made in the Radio Report that applies with equal validity to television was made in the context of the Commission's consideration of whether or not (the Commission decided not) to adopt a mechanism for prompt termination of LMAs. The Commission observed:

> "We have permitted various joint venture arrangements among stations, including joint sales of commercial time, for a number of years and **nothing in our experience** in that time or in this record **suggests that such arrangements have undermined our diversity goals or impaired competition among broadcast stations.**"

Radio Report, 7 FCC Rcd at 2787 (emphasis added). This statement, and the fact that all of the commenters who addressed the issue of LMAs in response to the NPRM apparently supported the continuation of LMAs, compel the conclusion that the Commission ought to approve the continued use of LMAs and other joint ventures between television stations as in the public interest.

For the reasons discussed above, LSOC urges the Commission to permit and encourage separately owned and licensed television stations, consistent with the requirements of the antitrust laws, to enter into joint ventures and other cooperative arrangements, including time brokerage, program affiliation, and simulcast agreements. Same service agreements and cross service agreements should be treated equally.

Such joint venture agreements should be permitted regardless of market size or number of stations in a market. Indeed, it is the smaller markets, where stations' very existence may depend on such agreements.

LMAs and other television joint venture agreements should not be limited by audience share, nor should there be a limit on the number of stations in any given market that are permitted to enter into such agreements. It would be unwise and almost impossible for the Commission to begin deciding which stations in a given market could enter into such agreements and which could not.

As the Commission did in the radio ownership proceeding, the Commission should require that all such agreements be filed at the Commission, placed in the respective stations' local public inspection files, and disclosed in ownership reports (with confidential and proprietary information redacted). No further regulation or reporting should be necessary. All television licensees must comply with antitrust laws and must maintain control over their licensed facilities. No regulation or prior review of television LMAs and similar agreements is necessary. The Commission's complaint procedures are adequate to monitor whether or not the stations involved are serving the public interest.

Finally, if a licensee enters into such an agreement, in reliance upon and following prior Commission and staff rulings, and properly files and reports the agreement or arrangement, it should not suffer any disadvantage or demerit at renewal time by virtue of having entered into such an arrangement.

Such a permissive policy on joint ventures would not obviate a need to alter ownership limits, and altering ownership limits does not obviate the need to encourage joint ventures.

VII. CONCLUSION

The ownership restrictions placed on television broadcasters were developed in response to industry, market, and technological conditions that no longer exist. The existing rules no longer serve the purposes for which they were established and may even thwart those purposes by preventing broadcasters from effectively competing against their competitors.

The Commission should let marketplace conditions prevail. Given the volume of diverse viewpoints and the level of competition facing commercial broadcast television today, the public interest standard, marketplace conditions, antitrust laws and other state and local regulations offer sufficient limitations on the ownership and operation of television stations to ensure that the Commission's goals of competition and diversity will be protected and fostered.

Respectfully submitted,

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